Supreme Court, U.S.
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No. 92-1636

In The

Supreme Court of the United States

October Term, 1992

RICHARD N. BOWMAN,

Petitioner,

vs.

WESTERN AUTO SUPPLY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issue framed by petitioner is more accurately stated as follows:

> Does a discharged employee who fails to allege that his discharge was the result of a RICO predicate act set forth in 18 U.S.C. § 1961 nevertheless have standing to sue his employer under RICO for the discharge simply by alleging that the discharge was an overt act in a RICO conspiracy?

RULE 29.1 STATEMENT

Respondent Western Auto Supply Company, a Delaware corporation, is a wholly owned subsidiary of Sears, Roebuck and Co.

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REASONS FOR DENYING THE WRIT

I. THE CONFLICT ALLEGED BY PETITIONER DOES NOT REQUIRE THE COURT'S ATTENTION.

Petitioner attempts to portray the conflict in the circuits on the issue he presents as more severe than it really is. Petitioner's issue – whether a discharged employee can recover for the discharge under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), simply by alleging the discharge was an overt act in a RICO conspiracy – has now been addressed, directly or indirectly, by eight circuits. The circuits, including the Eighth Circuit below, appear to be resolving this issue in a nearly uniform way. The one apparent exception to these uniform decisions, an opinion last year by the Seventh Circuit, was interlocutory in nature and should not support a grant of certiorari in the present case.

The Court has denied certiorari twice in the last two terms on the identical issue petitioner now raises. It denied certiorari last term in *Reddy v. Litton Indus., Inc.*, 112 S.Ct. 332 (1991). At the time of that denial, a clear majority position was developing in the circuits, a position that the Eighth Circuit followed in the case below. That majority position, which has now been expressly adopted by four circuits and tacitly by at least two more, is that in order to maintain a RICO conspiracy action based on an employment termination, the employee must allege more than that the termination was an overt act in a RICO conspiracy – he must allege that the discharge resulted from one of the RICO predicate acts set out in 18

U.S.C. § 1961.[1] This same issue – whether a discharged employee must allege injury from a RICO predicate act in a RICO conspiracy case – was most recently presented to the Court in a certiorari petition filed March 2, 1993, which the Court denied on April 26, 1993. *See Haviland v. J. Aron & Co.*, 986 F.2d 499 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W 3635 (U.S. April 26, 1993).[2]

The RICO conspiracy issue presented by petitioner is closely related to an issue on which the circuits have uniformly *agreed*: whether a terminated employee has standing to challenge the termination as a substantive RICO violation under 18 U.S.C. § 1962(a)-(c). Every circuit that has considered this latter issue has concluded that a terminated employee lacks standing because the termination is not caused by any of the RICO predicate

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[1] A person may bring a civil RICO action if he is "injured in his business or property by reason of a violation of section 1962" of Title 18. 18 U.S.C. § 1964(c). Subsections (a)-(c) of section 1962 set out substantive RICO violations, while section 1962(d) makes it a separate violation to conspire to violate subsection (a), (b) or (c). Each of the substantive RICO violations in subsections (a)-(c) of section 1962 requires a pattern of "racketeering activity"; "racketeering activity" is in turn defined in section 1961 as any one of a number of listed predicate acts. 18 U.S.C. §§ 1961; 1962 (a)-(c).

[2] The *Haviland* issue on which the Court denied certiorari on April 26, 1993 was framed as follows:

> Whether a conflict among the Circuit Courts of Appeal – as to whether a RICO conspiracy plaintiff has standing to sue if he is injured not by a predicate act of racketeering but by an overt act in furtherance of the conspiracy – should be resolved by this Court?

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acts listed in 18 U.S.C. § 1961. *See Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987); *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1167-68 (3d Cir. 1989); *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1215 (5th Cir. 1988); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154 (6th Cir. 1990); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1993); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 322 (1991); *O'Malley v. O'Neill*, 887 F.2d 1557, 1562 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

The rationale for these unanimous holdings on RICO claims brought under 18 U.S.C. § 1962(a)-(c) is that there is no causal connection between the employee's termination and any activity RICO was designed to deter, a connection required by the Court's opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).[3] The courts of appeals have uniformly recognized that a terminated employee is injured not by any prohibited RICO predicate act, but by the termination itself:

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[3] The Court has recently emphasized that RICO activity must be the *proximate* cause of a plaintiff's alleged injury in order to support recovery. *See Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). Contrary to the vague allegations in Point II of the petition, there is no direct conflict between the circuits over the application of *Holmes* to employee termination cases. If anything, the fact that the Court's opinion in *Holmes* is so recent is a ground for *denying* certiorari in the present case so as to give the circuits a full opportunity to consider and apply the *Holmes* principles on RICO standing to employee terminations.

> Because the injury complained of here – [the plaintiff's] loss of employment – was not the product of bribery or any other predicate crime . . . but of her dismissal, the injury cannot be said to have occurred "by reason of" a RICO violation. Put another way, a claim for wrongful discharge cannot be successfully pursued under civil RICO when the injury itself is not the result of a predicate act.

Miranda v. Ponce Federal Bank, 948 F.2d 41, 47 (1st Cir. 1991).

Petitioner now argues that, notwithstanding the above unanimous authority on RICO substantive violations, the circuits are split on whether a terminated employee states a RICO claim merely by alleging that the termination was an overt act in a RICO conspiracy. It is undisputed that the clear majority of circuits that have considered petitioner's issue have recognized that in order to recover under the RICO conspiracy provision, 18 U.S.C. § 1962(d), a terminated employee must still have been injured as a direct result of a RICO predicate act. Four circuits have expressly so held. *See Miranda*, 948 F.2d at 48; *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman*, 985 F.2d at 387; *Reddy*, 912 F.2d at 294-95.[4] As the Eighth Circuit noted below:

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[4] Three more circuits have affirmed dismissals of complaints that appear to have included RICO conspiracy claims in addition to substantive RICO claims on the ground that the terminated employees lacked standing to sue, although the circuits did not specifically discuss standing under section 1962(d). *See Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1213, 1218 (5th Cir. 1988); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d

> [A]ny other result would render this decision merely a guide to the artful pleader. A civil litigant . . . rather than bringing a wrongful discharge claim in state court could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts.

985 F.2d at 388.

Petitioner points to two decisions he claims create a conflict with the clear majority rule that the Eighth Circuit followed below: the Third Circuit's decision in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), and the Seventh Circuit's more recent opinion in *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992). On examination, these cases do not create the absolute conflict that petitioner claims. The *Shearin* decision is distinguishable on its facts. The *Schiffels* opinion, while facially inconsistent, was an interlocutory decision that remanded to allow plaintiff to file an amended complaint. The interlocutory nature of the *Schiffels* decision does not create the kind of immediate conflict that should warrant the Court's present intervention.

The *Shearin* case was decided by the Third Circuit before the Court denied certiorari in *Reddy*; in fact, the alleged conflict in the circuits that *Shearin* supposedly caused was expressly considered by the Court at that time. *See Reddy*, 112 S.Ct. 332 (White, J., dissenting). The

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1175, 1178-79 (7th Cir. 1989); *Morast v. Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).

Shearin case was distinguishable then, and remains distinguishable today, so that *Shearin* does not contribute directly to the conflict petitioner alleges.[5]

The Seventh Circuit's decision last year in *Schiffels* admittedly conflicts, at least facially, with the majority position of the circuits, including the Eighth Circuit's opinion below. But the broad language of *Schiffels* must be read in context. The *Schiffels* court's pronouncements on RICO standing were made in the course of remanding to grant the plaintiff leave to amend her complaint:

> The defendants raise other deficiencies in Schiffels' complaint that we need not detail. Suffice it to say that as it now stands, Schiffels' complaint is subject to dismissal under Fed.R.Civ.P. 12(b)(6) [sic] does not adequately set forth that she was directly injured by a conspiracy to violate RICO. However, because the district court incorrectly held that only injuries directly resulting from predicate acts are sufficient to

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[5] The First Circuit in *Miranda* noted that *Shearin* was factually distinguishable from "whistleblower" cases such as the present one. *Miranda*, 948 F.2d at 48 n.9. The plaintiff in *Shearin*, unlike employees in typical "whistleblower" cases, was hired specifically for the purpose of filling an employment position that was a "front" for, and thus essential to, a RICO conspiracy. *Shearin*, 885 F.2d at 1168. Because the *Shearin* plaintiff's very employment position was part of the RICO conspiracy, firing her when she refused to cooperate was of necessity also essential to the ongoing conspiracy. *Id.* There are no such specific allegations in the present case. Here plaintiff alleges that his termination was the result of his attempt to act as a whistleblower. Unlike the plaintiff in *Shearin*, he does not, and cannot, claim that his own employment position was in any way essential to a RICO conspiracy.

> confer standing to sue for a conspiracy to violate RICO, it did not consider the sufficiency of Schiffels' complaint or give her an opportunity to amend. * * * Since Schiffels did not have an opportunity to amend her complaint in the district court, we will remand this case to the district court to give her that opportunity.

Schiffels, 978 F.2d at 353-54.

The Seventh Circuit was by no means confident that the *Schiffels* plaintiff could successfully state a claim for RICO conspiracy on remand:

> Schiffels thus has standing to sue under RICO if her complaint alleges an injury to her business or property proximately caused by an overt act in furtherance of a conspiracy to violate RICO, even though the overt act is not a predicate act required under RICO pattern. *This presupposes that Schiffels has properly alleged a conspiracy to violate RICO in the first place.*

978 F.2d at 351 (emphasis added).

The *Schiffels* court then noted that: "We agree with the defendants that Schiffels' complaint is deficient in several respects." *Id.* at 352. The most obvious deficiency was that the alleged conspiracy to cover up a RICO violation by terminating the whistleblowing employee was not necessarily a conspiracy to violate RICO:

> A conspiracy to cover up a past RICO violation is not necessarily a conspiracy to violate RICO, because the conspiracy to cover up does not necessarily include an agreement to the commission of a pattern of predicate acts.

Id. Thus the *Schiffels* court recognized that not every allegation of RICO conspiracy will suffice to give a terminated employee RICO standing, and it specifically recognized that the plaintiff before it might be unable to state a RICO conspiracy claim. Until the *Schiffels* complaint is amended and finally reviewed on appeal, it is difficult to tell precisely what the scope of the Seventh Circuit's ultimate holding may be.[6]

The rule ostensibly announced in *Schiffels* should be tested in a more concrete factual setting before it is held up as being absolutely in conflict with the position developed by the remaining circuits on the issue petitioner raises. On remand, it may develop that the *Schiffels* plaintiff is in a position analogous to the plaintiff in *Shearin*, in that she was actually participating directly through her terminated employment position in the challenged RICO conduct. More likely, as the *Schiffels* panel acknowledged, 978 F.2d at 352-53, the *Schiffels* plaintiff may be unable to connect her termination to any RICO conspiracy. Indeed, it is difficult to see in the abstract how a terminated employee who is not injured by a RICO violation under § 1962(a)-(c) could ever be proximately injured simply by

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[6] It is not even clear that *Schiffels* represents the Seventh Circuit's position on the use of RICO conspiracy claims in employee terminations. In its earlier decision in *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir. 1989), a case that involved allegations under both § 1962(c) and (d), the Seventh Circuit found that a discharged employee lacked standing because his termination was not caused by the alleged RICO conduct. *Id.* at 1179. The *Schiffels* panel acknowledged this potential conflict within the Seventh Circuit itself. *Schiffels*, 978 F.2d at 351 n.2.

a conspiracy to violate those same sections. The facts in *Schiffels* may be clarified on a subsequent appeal; until then, the alleged "conflict" may be more apparent than real, and the Court need not intervene.

The courts of appeals should in any event be given further opportunity to resolve any conflict in light of the Court's guidance in recent RICO cases. In addition to its decision adopting a proximate cause standard in *Holmes*, the Court recently warned against using RICO's "liberal construction" clause as "an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 61 U.S.L.W. 4207, 4211 (U.S. March 2, 1993). The *Schiffels* court had expressly *relied* on this same "liberal construction" clause to support its interlocutory decision. 978 F.2d at 350. The Seventh Circuit should be given the chance to consider these emerging principles on final review of the *Schiffels* case before this Court concludes that certiorari is necessary.

The Court has already denied certiorari twice on the same issue now raised by petitioner. The most recent denial was less than three weeks ago, when the identical conflict raised in this case was also present. Last year's interlocutory decision in *Schiffels* – the lone decision that appears to diverge from the clear majority of circuits – should not support certiorari unless, after final disposition of that case, it becomes apparent that a conflict truly exists.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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